No. 15363.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED MARIE YOUNG, individually and DANNY LEE YOUNG, DAVID RAY YOUNG and DANIEL RAY YOUNG, through their guardian *ad litem,* Mildred Marie Young,

Appellants,

vs.

AEROIL PRODUCTS COMPANY INC., a corporation, STRUCTURAL MATERIAL COMPANY, a corporation, and DERYL S. YUNDT,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Appellants have filed their alleged opening brief in the above entitled matter. Appellees have no quarrel with the statement of jurisdiction except with reference to the last paragraph thereof. On page 4 of their opening brief appellants allege that a statement of points on appeal was filed with the District Court on August 8, 1956. Appellees admit that a certain document so designated was filed on said date but allege and earnestly contend that said document does not comply with the rules of procedure of this court and is not sufficiently definite

or specific to confer jurisdiction on this court. Rule 18, 2(d), 46, 52(a) of the Rules of the U. S. Court of Appeals for the Ninth Circuit. This point will be more specifically argued and referred to in Point One of this brief.

Appellees contend that the alleged statement of the case set out in Appellants' opening brief is inaccurate and woefully incomplete. While this appeal is based almost entirely on the alleged insufficiency of the evidence the appellants have not set out all or in fact more than a small portion of the evidence. While appellees feel that the duty to do this rests with appellants they have nevertheless prepared a general condensation of the evidence, with appropriate transcript references, which is included in this brief under the heading of Statement of the Evidence. By so doing, appellees wish to assist this court in determining what the evidence actually was at the trial of the above action. However, appellees are not waiving any rights that they may have to object to the accuracy or sufficiency of the Statement of the case as set out in Appellants' opening brief.

Appellees' Counter-Statement of Facts.

Aeroil Products Company acted as a distributor of the Mulkey Conveyor in California. They did some minor assembling of the conveyor prior to delivery. However, they did not manufacture the conveyor or any of its component parts. Further, Aeroil had nothing to do with the design of the conveyor or of any of its parts. [Rep. Tr. p. 83, lines 3-23.] Harmon L. Weigart, a roofer of many years' experience, became acquainted with the Mulkey conveyor and other similar conveyors while he was working for the Bennett Roofing Company, long before

he went into business for himself in 1952. When he went into business he was thoroughly conversant with Mulkey Conveyors, how they were operated, how they were built, what they would do, and how they were used. [Rep. Tr. p. 141, line 7, to p. 142, line 23.] He had known the defendant Yundt, who at that time was manager of the Aeroil Products Company, for many years. When he went to see Yundt he had already decided that he wanted and wished to get a Mulkey Conveyor. [Rep. Tr. p. 142, line 23, to p. 143, line 24.] When he bought the conveyor he was given a Mulkey brochure. He had seen them previously while working for Bennett. [Rep. Tr. p. 149, line 12, to p. 151, line 14.] He carefully instructed his employees, including Herbert Young, the decedent herein, as to the use of the conveyor. That it was to be set at an angle to the house, that the wheels had to be level and that the wheels were not to go over rocks or bricks, or anything of that nature. Young operated the conveyor more than any of his other employees. [Rep. Tr. p. 143, line 25, to p. 148, line 11.] After he bought the conveyor he had a plate or riser welded on to the hitch end by a welder, Witness Annan. This raised the lower or hitch end of the conveyor 18 inches or more. The hitch was also lowered on to this plate a distance of 12 inches or more. Weigart is not an engineer. He had no advice except from Annan. [Rep. Tr. p. 144, line 22, to p. 145, line 12.] (There was a dispute as to whether the riser was thirty inches in height because the pictures in evidence and the amount of metal used by Annan in installing the riser were seemingly inconsistent with some of the oral testimony.) After the riser was installed and before the time of the accident in which Herbert Young was killed, the conveyor was negligently turned on to its side on two occasions while being care-

lessly backed when connected to a truck, which caused the conveyor to jack-knife and upset. The conveyor was damaged extensively on one of these occasions. [Rep. Tr. p. 136, line 22, to p. 139, line 1.] The repairs were made by Mr. Annan and were not checked by any engineer or tests. Weigart also took the conveyor to Annan on several occasions to weld it. He does not remember how many times but it was less than five. [Rep. Tr. p. 144, lines 3-21.] At the time of the accident the top of the conveyor was raised 20 feet high. It was stable at that height. [Rep. Tr. p. 175, lines 4 and 5.] The motor had been removed with the boom still in the air 20 feet. This lightened the lower or hitch end by 100 pounds. [Rep. Tr. p. 105, line 10, to p. 106, line 6.] Weigart had instructed his men to lower the conveyor to a 15 or 20 degree angle before moving it and not to move the conveyor while the boom was up. [Rep. Tr. p. 43, line 23, to p. 44, line 7.] For reasons of safety, the men customarily would move the conveyor out a foot or two and then crank down the boom till it had no clearance and then repeat till the boom was lowered. [Rep. Tr. p. 104, line 4, to p. 105, line 9.] The deceased pulled the conveyor back one step and then lifted the hitch he was holding and turned the conveyor a 45 degree angle while lifting the bottom of the riser till it was waist-high and the conveyor was parallel to the street. [Rep. Tr. p. 54, line 10, to p. 55, line 8.] The height to which the hitch end of the conveyor was raised while the boom was still elevated, coupled with the removal of the weight of the engine, caused the conveyor to over-balance. The boom end came down rapidly until it hit the ground with a crash. This impact caused the formerly lower end to collapse onto the hitch, pinning Mr. Young between the hitch and the axle and causing his death. [Rep.

Tr. p. 23, line 4, to p. 24, line 18.] Following the accident, Mr. Weigart, called Mr. Yundt on the phone at Roofmaster, where he was then working, and told him that an accident had occurred. At that time Yundt was no longer working for Aeroil and had no connection with Aeroil, which Weigart knew. Yundt notified the Manufacturer Mulkey of the accident. [Rep. Tr. p. 81, line 19, to p. 83, line 2.] Other than this phone call there was no notice of breach of an alleged warranty. There was no pleading of notice of breach of warranty in the complaint. The conversation between Weigart and Mr. Yundt was not received against Aeroil when an objection was made that it was not binding on them. [Rep. Tr. p. 135, line 12, to p. 135, line 17.] Appellants have not cited this ruling as error or stated any specification of error in regard to it. Plaintiffs have not attempted to prove any negligence in so far as Aeroil was concerned. They are basing their claim on alleged breach of warranty in so far as defendant Aeroil is concerned. There is no claim that the conveyor was purchased by the deceased or that any specific warranties were made to deceased. The only claimed representations made by Aeroil are the brochures which are contained in Plaintiffs' Exhibit 6. The Aeroil brochure [Ex. 6] contained no representations which were not directly copied from the Mulkey brochure [Ex. I]. The only expert testimony was that of Mr. Wood, called by plaintiffs. He testified that in his opinion there was a defect in design in the conveyor. That although it was stable when the boom end was elevated and was also stable when it was lowered for moving, if, and only if, the hitch end were raised sufficiently high when the boom was elevated to cause the center of gravity to go beyond the axle the boom end would descend and hit the ground

with a crash and that this crash would be sufficient to cause the hitch end to collapse onto the axle. [Rep. Tr. p. 171, line 21, to p. 178, line 9.] He testified that the welding of the riser on the hitch end of the conveyor changed the vertical center of gravity towards or nearer to the axle. The greater the height of the riser the greater the change would be. [Rep. Tr. p. 211, line 22, to p. p. 215, line 14.] Likewise the horizontal center of gravity was changed to a point closer to the axle by the addition of the riser. This change would increase in relation to the height of the riser. [Rep. Tr. p. 215, line 19, to p. 221, line 1.] The fact that the lower end of the boom was higher with the riser on it produced the result that to get the upper end to the same level of 20 feet the boom had to be raised to a greater angle which caused the struts supporting the boom to be at a steeper angle and which reduced the amount of motion needed to cause the conveyor to tip. [Rep. Tr. p. 222, line 10, to p. 223, line 9.] Mr. Wood did not observe whether or not the boom was in line or what welds had been made on it. He did not see the riser which had been removed by Weigart prior to his examination. Wood also did not check to see if the conveyor complied with the dimensions in the brochures. [Rep. Tr. p. 201, line 11, to p. 208, line 2.] Wood admitted that the natural way to lift the hitch end of the conveyor is by the hitch. He does not know how much the hitch was lowered when it was moved onto the riser. [Rep. Tr. p. 227, line 10, to p. 227, line 22.] One lifting an object is likely to raise it to where one's arms are more or less in height. With the riser on, one would be likely to raise the conveyor that much higher due to the lowering of the hitch. [Rep. Tr. p. 229, line 20, to p. 230, line 12.] If there were

no riser one would have to lift the hitch end of the conveyor three feet, four inches, above the ground to get to the balance point. [Rep. Tr. p. 238, line 18, to p. 236, line 3.] With an 18 inch riser if the hitch end were raised two feet, eight inches, it would reach the balance point. Mr. Wood did not consider the effect of the removal of the one hundred pound engine in his answer. This would have made the difference even greater. [Rep. Tr. p. 234, line 1, to line 11.] The higher the riser and the lower the hitch the greater is the hazard of raising the hitch end too high. [Rep. Tr. p. 237, line 24, to p. 238, line 2.] The above statement contains some of the more important testimony given at the trial of this action. As stated previously it is the contention of the appellees that it was the burden of the appellants to set out all of the testimony in order to establish the fact that the findings of the court were not supported by the evidence. However, since appellants have not seen fit to do so, without waiving appellees' right to object to the form and sufficiency of appellants' specifications of error and of their brief, appellees are hereby setting out a condensation of the testimony of all of the witnesses as to the happening of the accident, with appropriate transcript references. In so far as Wood's testimony is concerned, a great portion of it is of such a technical nature as to make it most difficult to understand without being able to see his diagrams and gestures, coupled with his demonstrations with the scale model. While the testimony was clear in court for the Judge, it is almost impossible to clearly condense here. For that reason appellees have merely set out the conclusions, opinions and admissions of Mr. Wood in his examination and cross-examination, with transcript references.

Statement of the Evidence.

Exhibit 1. The Mulkey Brochure was admitted in evidence but not necessarily as against all of the defendants. Other circulars of no significance were introduced as Exhibits 2, 3, 4 and 5, and the Aeroil Brochure was admitted as plaintiffs' Exhibit 6. [Rep. Tr. p. 8, lines 2-24.]

Lawrence George Bartlett, called by plaintiffs, testified as follows. He is a newspaper photographer. He heard about the accident over the radio and immediately went to the scene and took pictures. These pictures were introduced into evidence as Exhibits 7 to 13 inclusive. [Rep. Tr. p. 9, line 10, to p. 11, line 7.] According to his best memory, as refreshed by the pictures, a bumper jack and brute force were used to remove Mr. Young from the machine. He also took the picture which was attached to Mr. Baker's deposition. [Rep. Tr. p. 11, line 8, to p. 14, line 18.]

Mr. Lemoine Arthur Thomas testified for plaintiffs as follows: That in July of 1953 he was employed by H. L. Weigart as foreman of the roofing crew. He knew Herbert Young, who went to work for Weigart about July 1, 1953. On July 7th the conveyor was first brought on to the job. He and Herbert Young were present at the time. He saw Exhibits 1 and 6 on that date. [Rep. Tr. p. 14, line 20, to p. 16, line 13.] Mr. Weigart called his employees together and explained the machine to them. He showed them the folders as to the operation. He saw Herbert Young, who was present, read the Brochures. He and decedent continued to work for Wiegart until March 3, 1954. On that date he went to work at 7:00 A.M. Herbert Young went to work even earlier, since he brought the truck and conveyor

from Pomona. At the time of the accident Thomas was on the roof of the next house south of the house where Young was working. The buildings were two story block houses with the garage underneath. The back of each house was on the bank. The road was approximately level, very good, very smooth. There were no obstructions that he could see. There were curbs but no sidewalks. [Rep. Tr. p. 18, line 12, to p. 21, line 13.] Roy Baker was working with Herbert Young. Thomas could see Young. He and Baker were using the Mulkey conveyor to load the roof with rock. Thomas did not see them place the conveyor up on the roof but he saw them loading. Baker was on the ground putting the sacks of rock on the conveyor and Herbert Young was taking them off on the roof. The street was narrow and the conveyor was set at an angle to the street. There was approximately six inches' clearance between the elevator and the edge of the roof. [Rep. Tr. p. 21, line 14, to p. 22, line 25.] The upper end of the conveyor was about knee-high off of the roof. There was a gasoline engine on the conveyor at the bottom or hitch end on the side next to the gear box which moved a chain with clips on it, to move the material up. Herbert Young climbed down the conveyor boom. He saw Young and Baker remove the motor, then they set it on the back of the truck. Then Herbert Young turned around to the conveyor, picked it up several inches, took one step back and swung to his right, and in doing so raised the bottom of the conveyor waist-high. Thomas saw the upper end of the elevator descend very rapidly and Young was hanging on to the hitch end, which was going up into the air, in a curled down position. He went up about as high as the top of the roof. Then the top end of the conveyor hit the ground with a crash and the conveyor

came down in a whip fashion and Young was caught between the hitch and the axle. This took three to four seconds. [Rep. Tr. p. 23, line 1, to p. 24, line 19.] He called Herbert Young's brother and ran to the scene. Baker was already there. Young had been handling the machine the way that they customarily handled it. After the accident Herbert Young was in the position shown on Exhibit 7.

On cross-examination, Thomas testified that Herbert Young had been working for Weigart six or seven months before his death. Mostly Young handled this particular conveyor. Baker was helping him that day. Sometimes Young moved the conveyor alone but it is a two-man job loading it. The top of the roof they were loading was about eighteen feet above the street. All of the roofs were about the same height from the street. The conveyor was set at about the angle where the roof of the garage joins the roof of the house itself. [Rep. Tr. p. 24, line 20, to p. 28, line 20.] The top of the boom was about knee-high above the roof, which is the easiest level to lift off the load. Thomas was on the next house. He was standing at the ladder and had just lowered a bucket for more asphalt. He watched Herbert Young from the time that he started down from the roof until the accident happened, a period of about four minutes. Nothing in particular drew his attention to Young. Young walked down the cleats of the conveyor. Baker was waiting at the bottom. The conveyor was at about a 45 degree angle to the street. The top was at the joint where the roof of the house met the roof of the garage. If you looked at that house the garage would be to the right. It projected out about 10 feet. The top of the boom was about 10 feet further from the street than the front

of the garage. [Rep. Tr. p. 28, line 21, to p. 32, line 23.] When Young climbed down the conveyor boom a part near the top was leaning against the roof. When Young came down he helped Baker take off the engine and set it on the rear of the truck. They removed a block to loosen the belt and take off the motor. The arm that had been there originally had been broken. Thomas did not remember how long before. The conveyor, at the time of Young's death, was different from the brochure because Weigart had had two pieces of 18 inch sheet iron welded to the front of the conveyor and had had the hitch lowered. The 18 inch iron sheets were to raise the bottom of the elevator 18 inches from the ground. This made it easier to load on to the conveyor from a truck. The riser was installed about two weeks after the conveyor was purchased. [Rep. Tr. p. 32, line 24, to p. 35, line 6.] A welder in Pomona did the job. The installation weighed about thirty pounds. It was a permanent installation. The arm to hold the engine was broken after the riser installation. The truck was about eight feet from the conveyor. Both Young and Baker carried the motor to the truck. The accident occurred three or four seconds after Young got to the ground. He saw Young take hold of the conveyor hitch, raise it up about three or four inches, take one step back, swing to his left and raise the hitch waist-high. The trailer hitch was on the riser. [Rep. Tr. p. 35, line 7, to p. 38, line 23.] When Herbert Young raised the hitch end of the conveyor the top of the boom was in the same position it had been in, not resting against the roof but clear of the roof. When Young took one step back he moved the conveyor back, and then leaving the top of the boom at the same height he swung it to his left, clockwise, so

that the conveyor was parallel to the curb. The top swung over the garage roof. Young turned it about a 45 degree angle before he was lifted off the ground. There was some rock on the street that had been spilled on the street. [Rep. Tr. p. 38, line 24, to p. 42, line 11.]

If there were any obstructions, Young usually moved the conveyor that way. He could have pulled the conveyor back a foot or two and then lowered it until it came into contact with the roof and then pulled it out again. Thomas did not know how Baker did it. He had never seen Baker and Young move it back in that fashion. When he saw Young move the conveyor he would usually turn it parallel to the street and then lower the boom to move the conveyor to another location. He does not recollect seeing Herbert Young move the conveyor with the boom still up. [Rep. Tr. p. 42, line 12, to p. 43, line 25.] The instructions were to always lower the conveyor boom down to a fifteen or twenty degree angle, or lower, before moving it. Those were the instructions that were always given in connection with that conveyor. He had seen Herbert Young move the conveyor in the same way before but never saw him carried up into the air. Young was hanging to the hitch as he was in the air. He was lifted high enough so that he could see daylight between him and the house to the back. The conveyor boom is 32 feet long. The axle is close to the lower end and that is the way it was at the time. He is not sure if the conveyor was parallel to the street when Young was lifted into the air. The flat metal on Exhibit 13 is the riser he was referring to. It had been there for some months before the accident. It raised the lower end of the conveyor 18 inches from the ground. Thomas broke the arm which had held the engine in place by back-

ing into the conveyor with an automobile. The impact knocked the conveyor over. [Rep. Tr. p. 44, line 1, to p. 48, line 1.] The automobile was attached to the hitch and caused the conveyor to jack-knife and turn over. Two bolts were broken in the boom. It was repaired. He does not know if it was damaged other times before the accident to Young. James Young, the deceased's brother, was there at the time of that accident. A bolt here and there on the conveyor had snapped when the conveyor had been turned over before the Young accident, and the axle had a slight bend in it. This was the only Mulkey conveyor Weigart had.

Thomas testified on redirect examination. The conveyor that time was on a slight rise and when he backed it, it tipped over on its side. It did not collapse at that time. In order to lower the conveyor before turning it you would have had to have pulled it back about 8 to 10 feet. He had operated the conveyor and relied on the statements he had seen in the advertising as to how to operate the conveyor. [Rep. Tr. p. 48, line 4, to p. 53, line 25.] The only instructions that Thomas had had as to operating the machine were in the brochures.

On re-cross-examination Thomas testified Young picked the hitch on the conveyor up about three to four inches and then when he started to turn to the left he raised the hitch about waist-high. The bottom of the riser was about waist-high. The carriage of the conveyor is not on a swivel. The whole conveyor turned when Young turned it. When it was parallel to the curb the top of the boom commenced to descend, lifting Young up. [Rep. Tr. p. 54, line 1, to p. 57, line 9.]

James Alexander Baxter, called by plaintiffs, testified as follows: He was an electrician on the job. He saw

the accident happen. He was at the meter box, working on the corner of the house that the conveyor was on. The accident was about 9:00 A. M., or a little after. He saw Young pick up the trailer hitch with both hands, in a bent-over position, move it to his left, take about three steps and then raise the hitch up. It seemed Young was raising the hitch up as he was stepping to his left. Baxter then saw Young go up in the air. The upper end of the conveyor descended very rapidly. Young held on until the top of the boom hit the street. Then Young lost his handhold and fell. Immediately the trailer under-carriage collapsed and fell on him. Young was holding on with his hands above his head and his legs drawn up. [Rep. Tr. p. 57, line 16, to p. 59, line 25.] The street was about level. Baxter could not see the top of the conveyor from where he was working. He did not know Young personally. He had seen roofers move the machine before but does not know if Young was one of them or not.

On cross-examination Baxter testified the house they were working on was No. 744. On those houses the roofs were all about the same level from the street. The conveyor was set at between a 35 and a 45 degree angle from the street. He could not see the top but the left wheel of the conveyor, the one closest to the curb, was about 8 feet from the curb. The wheels, of course, were at the same angle as the conveyor. Baxter did not see where the other man was. The back of the truck was about 10 feet from the conveyor hitch. Young was about five foot ten in height. [Rep. Tr. p. 60, line 1, to p. 65, line 18.] Baxter does not know how far Young leaned down to pick up the hitch. Young was in the act of turning when Baxter first saw him, and was straight-

ening up. Part of the conveyor was approaching the curb as Young turned. Baxter did not notice which wheel or wheels were moving, or if either came into contact with the curb. Baxter left right after the accident. He did not see anyone put anything into the street. He does not know how the wheels moved when the conveyor collapsed. He does not remember a rock or brick as shown in pictures Exhibits 7, 11 and 12. It was muddy there.

Examination by the court: The boom end of the conveyor came down. Young was lifted up about ten feet. When the boom end hit the street it made a terrific jolt or jar. Young lost his handhold and fell with his head across the axle and the hitch fell right over him. Young was not touching any part of the conveyor as he fell. Baxter did not see how the carriage moved. [Rep. Tr. p. 65, line 19, to p. 70, line 25.] It was stipulated that the roof was about seventeen to eighteen feet above the street. [Rep. Tr. p. 71, lines 21 to 26.]

Deryl S. Yundt, called as a witness by the plaintiffs pursuant to Rule 43(b) of the Rules of Civil Procedure, testified that from sometime in 1949 to July 7, 1953, he was Pacific Coast manager of Aeroil Products Company. He managed principally the Los Angeles office, but also the San Francisco and Seattle offices. He did the buying and had charge of the employees of Aeroil. He was paid a salary. In July of 1953 he also owned 50 per cent of Roofmaster. He sold Roofmaster products to Aeroil and in some instances purchased from Aeroil for Roofmaster. [Rep. Tr. p. 73, line 7, to p. 75, line 9.] He has seen similar brochures to plaintiffs' Exhibits 1 to 6. Exhibit 6 is a catalogue of roofers' equipment put out by Aeroil Products Co. That catalogue was

primarily a mailer mailed out as advertising material. The Aeroil Mulkey All Steel Portable Conveyor is on the last page. Plaintiffs' Exhibit 1 is a brochure which was put out by the Sam Mulkey Co. in Kansas City. He carried that in his brief case as advertising for the Mulkey Conveyor. A copy was not delivered with each machine purchased. Ordinarily it was Exhibit 1 that was delivered with each conveyor, though Exhibit 6 could have been given out if they were short of copies of Exhibit 1. [Rep. Tr. p. 75, line 10, to p. 79, line 6.] He does not recall any statements at all made to Mr. Weigart concerning the sale of the machine involved. Though he does remember that one was sold to him. He assumes he made no statements, but he may have given the advertising material (probably a copy of Exhibit 1) with the machine or handed it to Mr. Weigart. Every customer was verbally given an instruction that the machine was only to be moved in down or towing position. He is quite sure he made such a statement to Mr. Weigart. In his deposition he said there were no statements to that effect in the advertising and that he does not remember making such a statement to Weigart. He cannot remember the conversation with Weigart. [Rep. Tr. p. 79, line 19, to p. 81, line 18.] Weigart called him the day of the accident, or the following day. (An objection was made by Aeroil to this question and the court admitted it but stated that the conversation would not be binding on Aeroil unless connected up with them.) Weigart told him that there had been an accident. He told Weigart that he could not get out to where the conveyor was and in fact that he was no longer employed by Aeroil, which had made that sale. He was selling conveyors at the time and he notified the manufacturer

Mulkey of the accident. Prior to delivery, Aeroil checked to see that the conveyor was put together properly, that the under-carriage was in proper position and that the winch assembly was properly assembled. That was done on every conveyor. Aeroil did not conduct any engineering tests in Los Angeles. [Rep. Tr. p. 81, line 19, to p. 83, line 23.] The statements in the brochure that were put out were statements from the Mulkey brochure that were given to them. Aeroil handed them out without making any investigation. The conveyors were brought to them in a knocked down condition. The Los Angeles office assembled the under-carriage, put the bolts together and placed the under-carriage underneath the main part of the conveyor, attached the cable and the hitch, the gear box and the motor base, then operated the conveyor to make sure it was in running condition, and delivered it to the customer. [Rep. Tr. p. 83, line 24, to p. 85, line 25.] They did no fabrication in Los Angeles. On July 7, 1953, he was acting for Aeroil only and not Structural Materials. Structural Materials was simply a billing and invoicing factor in the sale. Technically, Aeroil sold to Structural and Structural sold to Weigart. Structural received a differential in prices for their services as billing agent. Exhibit 6 was received from Aeroil's main office. Exhibit 1 was sent from Sam Mulkey Co. in Kansas City, Missouri. Exhibits 1, 2, 3, 4 and 5 were also handed out to prospective purchasers along with the machine.

Examination by Mr. Ives: He severed his connection with Aeroil officially November 1, 1953. After that he had no further connection with them. [Rep. Tr. p. 86, line 2, to p. 89, line 7.]

The deposition of Roy Baker was then read into evidence by plaintiff. Baker testified that he is a shingler and has been in the roofing business for about sixteen years. He is thirty years of age. He knew all of the Youngs since he was a kid. In March of 1954 he was working in Pomona for Weigart, and had been working for him for four or five months. He was pretty well a flunky. He worked on a hot pot crew, loaded the roofs and did just about everything. He and the Youngs were working for Weigart on that day in Monterey Park. Herbert Young was a roofer, he worked on the hot pot, drove a truck and loaded roofs. The truck was a '48 Chevrolet. It had a home-made hitch on the back of it that was put on by a welding shop in Pomona. It was dropped down low to pull the conveyor so it would be level. [Rep. Tr. p. 91, line 16, to p. 94, line 18.] Herbert Young loaded roofs. They used two types of loading, the conveyor and loading by hand. Young directed both types. In loading by hand they backed the truck as close as possible to a building and threw the marble up on top. In loading by conveyor they backed the conveyor up to a building, raised the boom up, backed the conveyor up and leaned it against the top of the building, having the upper end a comfortable height, about to your belly, above the roof. Weigart had only one conveyor—he did not know the name of it. Baker had never seen any literature of any kind or publications with reference to the conveyor until after the accident. Nor had he ever seen any in the possession of anyone else around the job. [Rep. Tr. p. 94, line 18, to p. 95, line 23.] Weigart had that conveyor before Baker went to work for him and had it the entire time until the accident. James Young had been a shingler and was made

a foreman before the accident. Two guys besides Herbert Young used the conveyor, Baker did not remember their names. Neither of them was working at the time of the accident. It took two to run the conveyor except when Herbert Young was running it. Baker had run the conveyor but never without someone else's help. He had seen Herbert Young load five houses a day with the conveyor during the course of several months. The accident happened on a typical California day. It was not raining. They were loading with the conveyor on that day because it was a two story house. [Rep. Tr. p. 95, line 24, to p. 98, line 11.] He and Herbert Young were using different colored materials and Young had loaded the truck so that they would come off just right. The conveyor was already at the job when Baker arrived. He did not know if the deceased had brought it or not. The accident happened on the third house that they were loading. The houses were built up into the side of a hill. He does not remember if the street was level. The paving was new. The garages stuck out from the front of the houses. Sometimes they would be on one side and sometimes on the other. The conveyor was placed against the garages that stuck out the farthest. Young would back the truck as close as possible and then back the conveyor into place. When they moved the conveyor from one house to another the boom would be down so that it was approximately level. [Rep. Tr. p. 98, line 12, to p. 101, line 25.] After it was in position next to the house he and Herbert Young would crank the conveyor until the top of the boom was belly high above the roof for convenience. The bottom of the boom was about two feet above the ground. He and Herbert Young took the motor off when they were going to move the conveyor.

When he was there they used blocks to tighten the motor. There were supposed to be bolts but there were none on the conveyor when the accident happened. They had been broken off before. When the conveyor was horizontal the hitch on the conveyor was the same height as the hitch on the truck. Once the conveyor was in position it was left there until the roof job was finished. He and Herbert Young raised and lowered the conveyor by moving it a little and then cranking it up or down and then moving it again. Baker never pulled the conveyor far enough out from the house so that the boom could be lowered the whole way at one time. Baker did not believe he ever saw anyone do it that way. They always lowered the boom in stages toward the garage or house for reasons of safety. [Rep. Tr. p. 102, line 1, to p. 105, line 9.] When Young was killed Baker was about three steps away. Baker had taken the motor, which weighed about 100 pounds, off the conveyor at the request of Young, and Baker was about to put the motor in the truck when he heard the boom fall. When Baker took the motor off the conveyor the boom was up fully extended. Baker's attention was attracted by a crash, not very loud at that, and he ran to the conveyor and tride to lift it off of Young before he saw what had happened. [Rep. Tr. p. 105, line 10, to p. 106, line 21.] When Baker last saw the conveyor before it fell it was sort of catercornered toward the garage, not square with it. When he first saw the conveyor after the accident it was not moving. It was parallel with the street. The conveyor had jumped back towards the truck about ten feet. He and Young were the only two of Weigart's men on that house. There were a couple of crews mopping further on down the street. The foreman, whose first name was Leroy, was up on the roof of a house

about five houses down. There was an electrician nearby. He had seen the conveyor collapse once before, about two months before Young was killed. [Rep. Tr. p. 107, line 2, to p. 109, line 17.] Herbert Young and his brother were both there at the time. The conveyor fell over sideways. It had to be picked up and put on the truck. The conveyor was taken to a welding shop in Pomona. James and Herbert Young had a few words about it. James said that Herbert had let the truck roll, tipping the conveyor. Herbert said he did not. He heard the conversation. All of the roofers were present at the conversation. Baker had taken the conveyor to a welding shop before this occurred. It had been welded all over before it fell over. Baker did not know how many times it had been welded but you could see that it had been. Baker helped to move the conveyor but not too frequently. He did not like to work on it. [Rep. Tr. p. 109, line 18, to p. 112, line 16.] The procedure he had mentioned before raising and lowering the conveyor in stages was the way Baker had seen the conveyor moved every time it was moved. It was also the way it was moved everytime that Herbert Young moved it. Baker took it for granted that that was the proper procedure. Herbert Young was in charge of the conveyor when Baker was working on it. The conveyor was always the same length. Baker marked B-1 on the picture Exhibit A as the house where the accident occurred. The conveyor in the picture looked like it did after he heard the crash. The electrician shows in the picture. The roofs on the different houses were all about the same height from the street. With the conveyor at an angle you could pull it out and lower it without obstructing all of the street. At the angle it was set at the

time of the accident it would only obstruct about one-half of the street. Baker did not know what Herbert Young was doing from the time Baker took the motor off. Baker did not see the boom fall. [Rep. Tr. p. 112, line 17, to p. 115, line 19.] He was not present when Young's body was removed from the conveyor. He had taken James Young home. When Baker took the motor off the conveyor Herbert Young was standing with one foot on the bar of the conveyor. Herbert Young was not looking down underneath the conveyor. Young was standing straight up. When Baker said it was safer for two men to move the conveyor he meant that when you put it in the air about half the conveyor is aluminum and it was flexible. It would move around. A man just gets scared of it. Baker didn't necessarily mean that it was dangerous, he personally just didn't like to fool with it. Baker never heard Weigart say that one man could handle it and operate it. Baker never heard that until after the accident. Baker was scared of the conveyor. He is not a brave soul. Baker likes to load his roofs by hand like they do it in Texas. The picture seems to be the conveyor and the surroundings there. The picture was offered in evidence as Defendants' Exhibit A. [Rep. Tr. p. 115, line 20, to p. 118, line 10.]

Lowell E. Annan, called by plaintiffs, testified as follows: He is a welder and did welding for Weigart. He welded the plate on the lower end of the conveyor. He welded it on and reinforced it and lowered the hitch. It would weigh a few pounds over twenty pounds. Mr. Weigart had this particular conveyor in a few times to have it welded. Annan did not recall how many times. He did not know the over-all weight of the conveyor.

On cross-examination Annan testified: He did not check to see when he put the riser on the conveyor and does not remember when it was. He was served with a *subpoena duces tecum* by defendants. He does not know how high the riser was. When he put on the riser he lowered the hitch onto the riser. He lowered the hitch a good twelve inches, at least. He welded an eye to the main section of the riser and bolted the hitch to that section with a one-half inch bolt, and welded it on. [Rep. Tr. p. 118, line 16, to p. 122, line 2.] The hitch had not been welded before. He did not change it except to lower it. He had done work before on the stiffeners on the truss section of the conveyor. It is hard to recall how many times. The conveyor is lightly constructed. The stiffeners did break from road shock and possibly from metal fatigue. It would be safe to say he had welded the stiffeners before the accident at least two times. [Rep. Tr. p. 122, line 3, to p. 123, line 22.] Before the time Young was killed Weigart sent the conveyor in once (to the best of his memory). They said that it had fallen over. Annan straightened the frame some, the first time it had been turned over. It had bent back of the carriage. He straightened it up. He applied heat and pressure at that time. He had to straighten all the members up. There is some deflection in these conveyors just from the weight. He brought the conveyor up to what he is sure it was originally, merely by looking at it.

Examination by the Court: These members in here would break at the angle iron here and the other stiffeners that come down to make cross section would also break and that is generally what he welded. Plaintiffs' Exhibit 9 gives a better view. The hitch originally was attached to the conveyor itself, to the boom. He added the

vertical braces and the horizontal section and attached the hitch to the plate. [Rep. Tr. p. 124, line 10, to p. 129, line 19.]

Harmon L. Weigart called on behalf of the plaintiffs testified as follows: He employed Herbert Young in July of 1953. He remembers bringing the conveyor to the job. He had brochures, Exhibits 1 to 6, and he showed them to Herbert Young. He went over them with all the employees. Young worked for him steadily from that time until he was killed except when it rained. Weigart had the plate installed and the hitch lowered within a month from the time that he bought the conveyor. He received a brochure like Plaintiffs' Exhibit 1 from Roofmaster. He produced it and it was marked Plaintiffs' Exhibit 14. He had it when the accident occurred as he remembers he had two of them, this one and the one that had Aeroil on it. The one from Roofmaster was received after he bought the machine. [Rep. Tr. p. 129, line 21, to p. 134, line 11.] Young received pay raises because he was more experienced in what he had to do in roofing. Weigart was not present at the time of the accident. He was told about it and went to the scene. Sometime that day he remembers a phone call to Deryl S. Yundt. He told Yundt that the machine had collapsed and killed one of his employees and that he would like to have him come to the scene to see the machine. Yundt stated that he knew what happened and there was no need of coming out. (This conversation was not admitted as to defendant Aeroil as it was held as not binding on any defendant not coupled up with Yundt.) When Weigart purchased the conveyor he relied on the statements as to how it was to be used and that one of his employees could handle and operate the

machine and he relied on the advertising matter that he showed his employees. [Rep. Tr. p. 134, line 12, to p. 136, line 20.]

Weigart testified on cross-examination: He does not remember how many times he had welding done on the conveyor before Young was killed. Annan did the repair work. The conveyor had fallen over on its side twice before Young was killed, once at Santa Ana and once at Monterey Park. Once Thomas was driving the truck, or so Thomas said. Annan did the repair job that time. The second time was at the Kimball tract. Annan also repaired the conveyor then. It was loaded on a truck and taken to the welding shop. He does not remember when this was with reference to the accident when Young was killed. Weigart went over the brochures with his men and told them how to raise and how to lower the conveyor and how to put it into position. He said to pull it away from the building before lowering it. He said to lower it first before moving it. He also said never to move the conveyor while the boom was raised except to move the conveyor from the house far enough so that it could be lowered. Those were the instructions he gave all of his employees, including Herbert Young. [Rep. Tr. p. 136, line 22, to p. 141, line 4.] Weigart had been familiar with the Mulkey conveyor for quite some time. He first went into business for himself in 1952. Before that he was in the roofing business with the Bennett Roofing Company. While he worked for them he had occasion to use a Mulkey Conveyor and was thoroughly familiar with the use of a Mulkey Conveyor. He had also used other types of conveyors. When he went into business for himself he was thoroughly conversant with the operation of a

Mulkey conveyor and how it was built, what it would do and how it was used. The same was true with reference to other conveyors. He knew Yundt before he went into business for himself and he was in there quite often. He had talked to Yundt about Mulkey conveyors while he was working for Bennett. [Rep. Tr. p. 141, line 7, to p. 142, line 23.] When he went in to purchase the conveyor there was nothing different about the conversation than from the conversations he had had before. Weigart told Yundt that he wanted a Mulkey conveyor because he knew Mulkey conveyors from previous experience. The reason he bought one was because he liked it better than the other kinds he had used. When he went in it was to get a Mulkey conveyor if he could arrange the credit. He wanted a Mulkey conveyor. [Rep. Tr. p. 142, line 23, to p. 143, line 24.] He was not present at the time of the accident. He does not remember how many times the conveyor was welded other than the times when it had fallen over. He is sure it was less than five times. No one except Annan worked on it after it had fallen on its side. He had no tests made as to whether it was straight, except his eye. Annan put the riser on for him. Annan lowered the trailer hitch at the same time about a foot. They discussed it before it was done. No one else advised them. Weigart is not an engineer, he does not know about Mr. Annan. The boom could not swing from side to side without turning the wheels. He had instructed his men that the boom was to be raised to roof level. He had instructed them that the boom was to be at an angle to the house but not at what angle. The wheels could be on the street or around the house as the case might be. The conveyor can't be loaded unless it is level. Weigart also instructed the men that

when the conveyor is to be moved the wheels were to remain level and not go over rocks or bricks or anything of that nature. He gave these instructions to Mr. Herbert Young. Young operated the conveyor on an average more than the other employees did. On an average Herbert Young would load more than ten houses a week. On that day the foreman had appointed Baker to work with Young. He might have received the Roofmaster brochure through the mail in the late part of 1953 or early in 1954. All of his dealings with Yundt about this sale were at the Aeroil Products Company place of business. Roofmaster was never mentioned. No representations were made to him on behalf of Roofmaster. When he called Yundt after the accident he called him at Roofmaster. When Weigart was working for Bennett he first saw copies of the brochures which are Exhibits 1 to 6. [Rep. Tr. p. 143, line 25, to p. 151, line 14.]

Lowell E. Annan recalled by plaintiff testified further: That he had searched his records and brought the invoices on the Mulkey conveyor that Weigart owned. The plates or riser was installed on August 28, 1953. Annan used three square feet of quarter inch plate, a total of 31 pounds. With the braces it weighed altogether 46½ pounds. His next invoice was December 31, 1953, when the conveyor was turned over. The conveyor was out of line. Annan re-welded different parts of the conveyor that had been broken from turning over. There were nine hours of work involved. 12 pounds of angle iron were used to reinforce the conveyor and there were sixteen ⅜ x 1 machine bolts to replace the bolts that had sheared. There were two ⅝ x 1½ cap screws and hex nuts to replace bolts that had sheared. There were 2½ feet of ½ inch pipe which he would imagine were on the

diagonal braces replacing some that had probably broken. After he repaired the conveyor he would say that structurally it was in the same condition it had been before it was turned over. [Rep. Tr. p. 156, line 17, to p. 159, line 9.] His next invoice is January 23, 1954. He straightened and re-welded the conveyor. He straightened its diagonal braces again. They would break loose due to vibration in the use of the conveyor which would move the diagonal brace off the vertical. He would pull them back in and re-weld them. The diagonal braces the cross section of the conveyor because it is the support for the top of the conveyor. That has nothing to do with the under-carriage. There was one hour's work on this job. The next repair bill was February 11, 1954. It was the repairing of and welding of the conveyor frame. That would be those diagonal braces breaking again. That job took twenty to thirty minutes' time. His next invoice is March 9, 1954, after the accident which is involved here. That took one and a half hours. [Rep. Tr. p. 159, line 9, to p. 160, line 22.]

Annan testified on cross-examination: He makes a daily record of all work that goes through his shop. The invoices are numbered and he keeps them in his files in numerical order. If the work is clean and in the open there could be more than one weld made in twenty to thirty minutes. In the nine hour job a lot of time was used in preparing the work. If something is bent it has to be placed on a level and a chain or something applied to put pressure on it and pull it back into normal position. It is hard to establish how many welds there were from the amount of time. There was about ten times as much labor on the job of repairing the conveyor after it had been turned over as there was on the job following the

accident in which Young was killed. It took ten times as much time to repair. [Rep. Tr. p. 160, line 22, to p. 162, line 18.] When he had completed the December, 1953 job, after the conveyor was turned over, from his many years experience in doing that type of work and from looking at the conveyor he could tell it was in its former condition. No measurements were made to see whether the conveyor or the under-carriage conformed to the plans. They did check the hitch from the pulling point back to the axle to see whether the component parts used in towing it down the highway were affected. This would require a check of the carriage the conveyor rests on also because that is a part of the axle. He believes that in 1953 when the conveyor was turned over the pipe in the under-carriage was broken loose where it joined the axle. He applied heat and pressure to the conveyor on the upper portion and he may have applied heat and pressure to the under-carriage also. The invoices were introduced into evidence as Plaintiffs' Exhibit 15. [Rep. Tr. p. 162, line 19, to p. 164, line 25.]

Mrs. Young testified that Herbert Young weighed 142 pounds at the time of the accident. [Rep. Tr. p. 165, lines 13-22.]

David Shotwell Wood called by plaintiffs testified as follows: That he is a professor of engineering at the California Institute of Technology. He was qualified as an expert witness in Mechanical Engineering. He viewed Weigart's Mulkey Conveyor after the riser had been removed. He made some measurements of what he considered to be the pertinent dimensions. He has seen the original of Plaintiffs' Exhibits 1 to 6. [Rep. Tr. p. 166, line 4, to p. 169, line 25.] He has made himself familiar with those aspects of the design of the conveyor

that he considered pertinent to the behavior of the conveyor during the accident. Plaintiffs' Exhibit 16, a model, demonstrates the broad basic features of the conveyor in a qualitative type of way. This model demonstrates the kinetics of the behavior of the machine. He made various measurements of the conveyor in question, particularly the overall length, the length of the articulated members of the under-carriage, and the weight to give him the balancing characteristics of the machine. [Rep. Tr. p. 170, line 2, to p. 171, line 20.] He is of the opinion that assuming the riser had been welded on and the street was a level macadam surface and the upper end of the conveyor was twenty feet high and that the man at the lower end weighed 142 pounds, and that the engine was not attached, and that the upper end of the conveyor hit the street and then that it collapsed as shown in the pictures, that there is a defect in the design which could lead to a collapse as shown by the pictures. In the normal raised or lowered position the conveyor is a stable structure. If the lower end is lifted until the center of gravity of the whole machine is over the axle then it is in what he would call an unstable balanced position and it can fall either way. If it falls over so that the upper end hits the ground with some impact then it will collapse. [Rep. Tr. p. 171, line 21, to p. 178, line 9.] When he examined the machine the plates were not on it. He then gave various measurements and weights. From the nature of the machine it seems apparent that there is a bit more weight toward the rear end because of the gear and the winch. However it is easy to lift the hitch end. Assuming that 46½ pounds of plates had been welded on it would shift the center of gravity slightly about eight inches to the rear. He never testified as to what

the effect of the engine weighing 100 pounds on the conveyor would be or how much it would change the vertical or horizontal center of gravity. The weight of the man would shift the center of gravity further to the rear. As he lifts the hitch end of the conveyor up, the power needed decreases, until the center of gravity gets directly above the axle and no force is needed to hold it up. According to his calculations, if the machine is raised five feet five inches off of the ground at the hitch end with a 150 pound man holding onto it, it will balance. If the end goes higher than that the man will not be able to prevent it from tipping over. [Rep. Tr. p. 178, line 10, to p. 189, line 25.] As it continues to tip it generates 914 foot pounds of energy which creates a shock when the upper end of the boom strikes the ground. If this energy is sufficient to cause the strut to become vertical the conveyor will collapse. [Rep. Tr. p. 190, line 14, to p. 195, line 19.]

The basis of his statement about the collapse of the machine being due to design is that there is a larger amount of energy available due to the machine tipping over than is required to counteract its stability and leads to a rapid collapse. In his opinion if the 18 inch plate had not been on the normally lower end there would have been some slight but in his opinion insignificant changes. The energy generated by the machine tipping over would be less but still more than needed to cause the machine to collapse. If the rollers were constricted this type of collapse could not occur. [Rep. Tr. p. 195, line 20, to p. 197, line 15.]

Wood testified on cross-examination: The conveyor would only collapse as he has described if it tips over and the top end hits the ground with a crash. This con-

veyor is balanced like an inverted pendulum or see-saw. He examined the conveyor in January of 1956. It was 32 feet in length and he considered the hitch as being 16 inches in addition. When he saw it the hitch was on the conveyor itself and not on the plate or riser. The riser was not on the conveyor. His figures were based entirely on what he was told about the weight and height of the riser. The hitch end is a little heavier than the upper end of the boom. He did not mention the effect of the weight of the engine in this connection. Any trailer is designed so that it will be slightly heavier toward the hitch end. The conveyor is designed to be taken from place to place by the hitch. [Rep. Tr. p. 197, line 14, to p. 201, line 10.] He did not measure the height of the axle off the ground. He took no particular note of welds or work that had been done on the conveyor. One or two were pointed out to him. He does not remember if he was told of any previous tipping over of the conveyor or of the damage due to said tipping. He made no checks to see if the machine complied with Exhibits 1 to 6. He could not have done so as the drawings were not complete enough to permit that. He does not know the height of the bed in a Chevrolet truck. He does not know whether when the conveyor is used to lift loads onto a roof it is customarily leaned against a roof or not. He has never seen one in operation. [Rep. Tr. p. 201, line 11, to p. 208, line 2.] Generally if the conveyor is used without resting the top of the boom on something it would put a good deal more stress and strain on the top of the boom. He made no observation to

see if there had been any twisting or distortion of the boom itself. He cannot tell from the pictures in evidence whether the top of the boom was resting on something or not. One of the factors as to the tipping over of the conveyor is the height to which you raise the bottom or hitch end of the conveyor. If you raise that end high enough so that the center of gravity goes above or beyond the axle it will tip over. If the conveyor was in the elevated position it would be stable. [Rep. Tr. p. 208, line 2, to p. 210, line 3.] His calculations were based on the fact that the lower end of the riser would be on the ground. He calculated the position of the center of gravity with and without the riser. With the riser the center of gravity would be eight feet eleven inches off the ground. Without the riser the center of gravity would be eight feet, six inches, or a difference of five inches. He did not state what difference the weight of the motor would have made. If the riser was higher it would add to the difference. [Rep. Tr. p. 210, line 3, to p. 215, line 18.] The machine can not tip over until the hitch end has been raised a certain distance off of the ground unless a weight is placed on the other end. Besides the vertical center of gravity there is also the horizontal. With the riser on and without the weight of the motor or of a man, and with the top raised twenty feet the horizontal center of gravity is twenty-two inches from the axle on the hitch side. If the riser were not on then the horizontal center of gravity would be five inches further from the axle, or twenty-seven inches. [Rep. Tr. p. 215, line 19, to p. 221, line 23.] The higher the hitch end the

more acute is the angle to which you have to place the struts to get the top to the same level. He cannot tell from the pictures what the height of the riser is. The wheel is twenty-nine inches high and the riser seems higher in pictures taken from several directions. He made no measurements of the height of the riser. [Rep. Tr. p. 221, line 23, to p. 227, line 9.] If he went to lift the end of the conveyor he would take hold by the hitch. It is the only thing that would be convenient to hold on with. He cannot tell how much the hitch was lowered by looking at the pictures. When the hitch is lower a person moving it tends to lift it up into a position where one's arms are more or less in height and the total height of that end of the conveyor off the ground is higher when the hitch is lower with respect to the conveyor. [Rep. Tr. p. 227, line 10, to p. 230, line 12.] The weight of a man lifting the hitch end does not begin to come into play until the conveyor reaches the point of balance. According to his calculations the under-surface of the boom at the hitch end without the riser would have to be lifted to a height of three feet three inches to reach the unstable balance point. He did not say how much higher it would have to be with the engine on. The slant height to the top of the boom would be somewhat under ten inches. With no riser on the operator would have to raise the hitch end three feet four inches to get it to the point where the conveyor would tip forward. With an eighteen inch riser if the hitch were raised two feet eight inches it would reach the point of unstable balance. [Rep. Tr. p. 230, line 13, to p. 236, line 3.]

ARGUMENT.

I.

The Appeal Should Be Dismissed for the Reason That Appellants Have Not Complied With the Rules of the United States Court of Appeals for the Ninth Circuit.

The appellees urge that this appeal be dismissed for the following reasons:

The appellants did not comply with Rule 18, 2(d) of the Rules of the United States Court of Appeals for the Ninth Circuit. The Specifications of Error are twenty-seven in number. Only numbers I and IX are specifications not taken from the findings of fact and conclusions of law. The specifications do not set out any grounds of error such as error in admission or rejection of evidence. The Specifications XI through XXVII merely state that the findings are not supported by the evidence or are an erroneous conclusion of law.

In *Thys Company v. Anglo California Bank,* 219 F. 2d 131, at pages 132 and 133 the court states:

> "The specification does not, as this provision of the rules requires, state as particular as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. Defects in this particular are not remedied by referring the reader to the pages of the brief where the points are argued.
>
> Where as here, the brief for an appellant exhibits a gross disregard of the requirement of our rules, a dismissal of the appeal is warranted."

II.

The Judgment Should Be Affirmed for the Reason That the Evidence Supports the Findings.

Under Rules 52(a) and 46 of the Rules of the United States Court of Appeals this court should not consider the error urged by appellants that the evidence does not support the findings. In *United States v. U. S. Gypsum Company,* 333 U. S. 364, at page 394, the rule is set forth by Justice Reed:

> "Findings of fact in action tried without a jury, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Further, in *Andrew Jergens Company v. Conner,* 125 F. 2d 686, at page 689, where the action was tried by the court sitting without a jury, as in the case at bar, the court said:

> "Where a case is tried by the court, a jury having been waived, the court's findings upon questions of fact are conclusive upon appeal, no matter how convincing the argument that upon the evidence the finding should have been different unless there is no substantial evidence to support them."

Justice Jackson, in the case of *United States v. Yellow Cab Company,* 338 U. S. 338, at page 342, states:

> "Such a choice between two permissible views of the weight of evidence is not *'clearly erroneous.'* "

The appellant in that case appealed on the findings of facts, which the court stated amounted virtually to a

trial *de novo* of the record of such findings as intent, motive and design.

This case involves a mechanical device and questions of fact concerning it.

In *Grover Tank and Mfg. Co. v. Linde Air Products Co.,* 339 U. S. 605, at page 609, Justice Jackson, in discussing this rule states:

> "Proof can be made in any form: through testimony of experts or others versed in the technology; by documents, including texts and treatises; and, of course, by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience."

Since the evidence in the case at bar is sufficient to sustain the findings of the trial court, and particularly since it involves a mechanical device and the expert testimony of the scientific problems and principles were all before the court, illustrated by gestures, diagrams and the operation of a scale model, it cannot be said that any of the findings were clearly erroneous.

III.

The Court Did Not Err in Giving Judgment for Defendants by Concluding That There Were No Express or Implied Warranties Available to Plaintiffs; That Privity of Contract of Sale Was Required Between the Deceased, Herbert Weldon Young and the Defendants; That There Was No Breach of Any Warranties Whatsoever; That No Notice of an Alleged Breach of Warranty Was Given and That There Was No Duty Upon the Part of the Defendants to Inspect the Conveyor.

Appellants have chosen to argue all of the above points in Point I of their Argument without breaking down specific points involved. Appellees feel that it is more orderly to divide the various portions of this argument into the separate points as above stated and will discuss each feature separately.

A.

There Were No Express or Implied Warranties Available to Plaintiffs in the Above Action Regardless of Any Question as to Privity of Contract.

The testimony showed, without contradiction, that there were no express statements made by the defendant Yundt at the time when he sold Mr. Weigart the conveyor. Weigart testified, as hereinbefore set out in Statement of the Evidence, that he had been familiar with the Mulkey Conveyor for many years and had used this and other types of conveyors, and was thoroughly familiar with their operation. When he contacted Yundt to purchase the conveyor he had already made up his mind as to what type of conveyor he wished to get. He did not rely on any representations of the defendant Yundt or any written advertisement of the manufacturer Mulkey

or defendant Aeroil Products. It is significant that there were no statements contained in the brochure published by the Aeroil Products Company that were not in effect copies of the contents of the brochure of the Mulkey Conveyor Company. This can be determined by comparing the wording of Plaintiffs' Exhibit 1, the Mulkey brochure, with that of Plaintiffs' Exhibit 6, the Aeroil brochure. The Mulkey Conveyor brochure is more complete and goes into more detail. Every statement that appears in the Aeroil brochure also appears word for word in the Mulkey brochure. Certainly the court could well have found, and must have found, under the testimony of Weigart that he brought the conveyor because of his own knowledge of the operation and manufacture and use of the conveyor and without any reference whatever to the advertising. Unless there is reliance upon representations or advertising matter there is no warranty.

Section 1732 of the Civil Code reads as follows:

> "Definition of Expressed Warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. (Added Stats. 1931, c. 1070, p. 2238, par. 1.)"

Burr v. Sherwin-Williams, 42 Cal. 2d 682, at 696 states:

> "(21) The principal elements of an express warranty are an affirmation of fact or promise by the seller and reliance thereon by the buyer."

Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, at page 193, states:

> "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

If there was no warranty in connection with the sale to Weigart there was no warranty in so far as the plaintiffs were concerned.

Moreover, even had Weigart or Young relied upon any representations in the brochures any warranty that might have existed would have been defeated by the fact that after the sale to Weigart, and long before the accident, the conveyor had been altered and changed in such a way as to completely alter its operation. It had also been considerably damaged in two accidents where it was negligently turned onto its side by Weigart's employees when they were attempting to back a truck with the conveyor attached and the truck and conveyor jack-knifed. As has been heretofore set out in the Statement of the Evidence (soon after the conveyor was purchased by Weigart) apparently in order to facilitate the handling of material from the floor of the truck bed, which is about thirty inches high, on to the bottom of the conveyor, Weigart had a riser welded to the hitch end of the conveyor. According to Weigart and Annan, the welder who installed it, this riser was eighteen inches high. According to the pictures in evidence it seemed to be at least thirty inches high. This thirty inch height certainly would

place the bottom of the conveyor exactly even with the floor of the truck from which it was being loaded. This had the effect of altering the horizontal center of gravity of the conveyor and of changing the vertical center of gravity. It also placed the struts in the under-carriage at such an acute angle to one another as to greatly increase the hazard of a collapse of the under-carriage. It is obvious that with the riser attached below the bottom of the conveyor and the hitch, by which it was naturally moved, and by which it was being moved by the deceased, being lowered to the bottom of that riser, that a person in moving the conveyor would be inclined to lift the hitch higher than would have been necessary had the riser not been installed. This increased the danger of the operator negligently over-balancing the conveyor and causing the upper end to come down upon the ground in see-saw fashion. This was the very thing which occurred and led to this accident. In addition, at the time of the accident the engine which operated the conveyor and which weighed approximately 100 pounds, had been removed from the conveyor while the boom end was up, which considerably changed the balance of the conveyor. Removal of the engine very much diminished the strength which would be needed by the operator to over-balance the conveyor.

Moreover, considerable damage was done to the conveyor on the two occasions before Young's accident when the conveyor had been negligently tipped upon its side. Repair of this damage required welding of the supports and straightening of the axle. This work was done by Mr. Annan under the supervision of Mr. Weigart. Neither of these gentlemen were engineers. They made no effort to establish whether or not the conveyor had

been replaced into its former size or shape, or to determine whether its balance had in any way been affected. Obviously, had there ever been any warranties as to this particular conveyor they would long before have terminated due to the alterations, misuse, damage and repairs to the conveyor. Among the authorities holding that a change of an article warranted defeats the warranty are the cases of *Collum v. Pope & Talbot,* 135 Cal. App. 2d 653, at page 660,

> "In other words, these changes which plaintiffs made in this piece of lumber were such as would seem to make it inequitable for the law to treat it as the very same article which the millowner sold to the dealer and the dealer sold to the contractor, when the urge is to extend an exception to the rule which requires privity of contract. Any express warranty seems clearly precluded by these changes."

Kling v. Kimball Pump Co., 138 Cal. App. 470, at page 472,

> "Respondent took the position that such failure, if any, was caused either by reason of the manner of installation of the foundations for the pump, which foundations appellants were required to furnish under the terms of the contract, or the rapid lowering of the water level in the well or the negligent manner in which the pump was operated by appellants. A review of the record leads us to the conclusion that there was ample evidence to sustain respondent's claims and that the trial court was justified in finding that said pump 'has at all times complied with and conformed to all of the warranties, representations and guaranties made by defendant and cross-complainant.' "

Ivancovich v. Bertossi, 202 Cal. 770, at pages 775 and 776, (1),

> "When we consider the evidence of Cassani that mixing the white or muscat wine with the Zinfandel wine would spoil the mixture, together with the other evidence in the case as to the unfavorable results that might result from the blending of wine by the use of a hose or other implements not properly cleaned, we are of the opinion that it was not an unreasonable conclusion or inference for the trial court to draw that the inferior quality of the wine and its unmerchantable character after it was blended was due entirely and solely to the acts of Mooser and his employees in the mixing and blending of the wine. The evidence, therefore, was sufficient to sustain and justify the findings of the trial court in favor of the respondent."

B.

There Was No Privity of Contract Between the Decedent, Herbert Weldon Young, and the Defendant Aeroil Products Company, or Yundt.

In connection with this appellants have cited three cases. First, the case of *Gagne v. Bertran,* 43 Cal. 2d 481. This is a case which is entirely dissimilar in facts. In the *Gagne* case the plaintiff hired an alleged engineer and geologist to make some cores for him to determine the depth of the fill on some property which the plaintiff was considering buying. The defendant was neither a geologist or engineer. He also carelessly made cores improperly determining the depth of the fill. The decision holds specifically that there was no warranty and that findings based on warranty were not supported by the evidence. Under those particular circumstances the

court held that the defendant was negligent and guilty of fraud and deceit. The case does not support appellants' contentions.

The second case cited by appellants on this point is *Free v. Sluss,* 87 Cal. App. 2d Supp. 933. This is an appeal from a Municipal Court action and deals with the sale of soap by sample. During the soap shortage the defendant manufacturer sold one batch of soap to the plaintiff which was satisfactory. Defendant salesman orally warranted that the second batch would be of a similar satisfactory nature. There was also a written warranty on the wrapper. Judgment in favor of the plaintiff against both defendants was upheld. This certainly does not afford any authority for the proposition on page 15 of appellants' brief to the effect that innocent misrepresentation of fact would support strict liability on the part of the seller. The case is merely a Superior Court decision.

The third case cited by appellants is the case of *Sheward v. Virtue,* 20 Cal. 2d 410. This is a case in which the court holds that the *manufacturer,* even in the absence of privity of contract, has a duty of care if the article manufactured is inherently dangerous, or if it is negligently manufactured, or constructed, or it is reasonably certain to place life and limb in peril. This case specifically does not involve the duty of the retailer. In fact the retailer, Bullock's Department Store, was granted a motion for new trial and the propriety of the court's granting the motion was not discussed in the decision.

In the instant case the conveyor was safe, sound and solid when balanced or raised to the maximum point mentioned in the brochure. The theory of plaintiffs is that if this conveyor is negligently over-balanced so that the

upper end of it violently comes into contact with the ground then the under-carriage may collapse. This is obviously not a negligently manufactured or constructed piece of machinery.

Moreover, there are decisions in California ignored by plaintiff directly holding that there must be privity of contract. One of the cases so holding is the case of *Burr v. Sherwin Williams Company,* 42 Cal. 2d 682, was erroneously cited by appellants as supporting their contentions. It does not do so. Appellants admit, on page 18 of their brief, that the general rule is that privity of contract is required in an action for a breach of express or implied warranty, which is the rule as stated in the *Burr v. Sherwin Williams* case. Appellants correctly go on to state that an exception to this general rule is cases involving food stuffs, and there are many cases so holding in California. However, there is no contention in this case that the conveyor involved food stuffs. Appellants go on to state that there is no requirement of privity of contract in cases where the person using the products relied on representations made by the seller in advertising material and that recovery was allowed on the theory of express warranty. The *Burr v. Sherwin Williams* case does not so state. In that case a judgment in favor of the plaintiff was reversed partially because of certain instructions dealing with *res ipsa loquitur,* but also with reference to instructions on warranty. The court states, on page 695, paragraph 19:

> "The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." (Citing cases.)

Among these cases the court cites and approves *Lewis v. Terry,* 111 Cal. 39, which will be mentioned later in this brief. It mentions that there is a possible exception where the purchaser of a product relied on representations made by the *manufacturer* without a showing of privity. This is not a case where the alleged representations are made by the manufacturer, and in fact the testimony shows without contradiction that the machine was designed and constructed by Mulkey, who did not appear in the above action, and are not involved in this appeal.

The only other cases cited by appellants in this regard are *Gagne v. Bertran, supra,* which, as stated before, involves a completely different situation factually, where a man held himself out to be an engineer and geologist when he was not, and where the decision was based on fraud and deceit and not on warranty; and the case of *Edwards v. Sergi,* 137 Cal. App. 369, wherein an owner of property and his brother falsely represented that a piece of woodland was included in a farm which was sold to plaintiff. Neither of these cases remotely resemble the case at bar and they do not support appellants' contentions. Nor do Sections 1572, subd. 2, and 1710 of the Civil Code, which refer to Fraud and Deceit, apply here. It would seem clear that Weigart, who knew and used Mulkey conveyors, would have a much better knowledge of them than the retailer who even according to appellants could not have learned of the alleged defect unless they had tipped the conveyor over with sufficient force to cause the crash to over-balance the conveyor's stability. There was not a word of evidence that this type of accident had ever occurred before or since.

The theory under which various cases, beginning with the New York case of *MacPherson v. Buick,* 217 N. Y.

382, was decided is the fact that the manufacturer might have superior knowledge of a defect than the ultimate consumer and for that reason that he may be held to warranties without privity of contract. The reasoning in these cases does not apply, nor do the decisions refer to the obligation on the part of a retailer. The cases cited by appellants, such as *Kalash v. Los Angeles Ladder Co.,* 1 Cal. 2d 229, are all cases against the manufacturer. The case of *Escola v. Coca-Cola Bottling Co.,* 24 Cal. 2d 453, deals only with the responsibility of the *manufacturer,* not the retailer. Moreover, in many respects it directly supports the contentions of respondents. At page 458 the court states:

> "(2) Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. (See cases collected in *Honea v. City Dairy, Inc.,* 22 Cal. 2d 614, 617-618 (140 P. 2d 369).) (3) As said in *Dunn v. Hoffman Beverage Co.,* 126 N. J. L. 556 (20 A. 2d 352, 354), 'defendant is not charged with the duty of showing affirmatively that something happened to the bottle after it left its control or management; . . . to get to the jury the plaintiff must show that there was due care during that period.' Plaintiff must also prove that she handled the bottle carefully. The reason for this prerequisite is set forth in Prosser on Torts, *supra,* at page 300, where the author

states: 'Allied to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as that of the defendant, and res ipsa loquitur will not apply until he has accounted for his own conduct.'"

The case of *Lane v. C. A. Swanson & Sons,* 130 Cal. App. 2d 210, concerns an express warranty by a manufacturer that a can of chicken contains no bones and has been boned. Again the reasoning of the decision comes within the warranty exception of Food cases and the court specifically held on page 216 in the last paragraph that it did not consider the question as to the defendant retailer.

> "The brief of the defendants does not point out any ground of distinction between the responsibility of Swanson and Sons Food Company with respect to the express warranty. We have not considered that question."

The case of *Tremeroli v. Austin Trailer,* 102 Cal. App. 2d 464, merely holds that a question of fact was presented and that a verdict of the jury could not be reversed where there was evidence of an implied warranty and of reliance by the buyer. It is a case where there was a privity of contract and is therefore readily distinguishable here.

The particular situation involved here has been directly passed on in California in the very recent case of *Collum v. Pope & Halbot, Inc.,* 135 Cal. App. 2d 653 (hearing in the Supreme Court denied). This case is factually directly in point. The defendant was a retailer who sold certain joists to plaintiff's employer. Plaintiff, while in the course and scope of his employment, sustained an injury when some of the lumber broke. Many of the cases cited by appellants were considered in the *Pope & Talbot* decision. The court holds that there was nothing in the case to bring it within the exceptions to the general rule that privity of contract is required before there are any warranties express or implied. In the *Pope & Talbot* case the defendant manufacturer stamped "Grade #1 or better" on some of the lumber. This corresponds to the brochures involved herein. It was contended in the *Pope & Talbot* decision that Cheim, as the dealer, warranted the quality of this joist because of this stamp and that the plaintiff acted in reliance thereon, to his injury. This allegation is identical to the claim made here by plaintiffs that by adopting the exact wording of the Mulkey brochure a specific warranty was made by defendant Aeroil. Certain work was done on the lumber by the defendants, cutting the logs into poles of varying sizes, and the court specifically held that this did not make them manufacturers within the meaning of that word as used by our Supreme Court. Similarly the minor assembly of the conveyor by Aeroil would not in any way make it a manufacturer. In the *Pope & Talbot* case the

lower court granted a nonsuit and denied a motion for a new trial. The Appellate Court held as a matter of law that there was no privity of contract and that no case had been established by the plaintiffs sufficient to warrant submitting the matter to a jury. The court stated at page 656:

> "The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale."

The court cited the *Lewis v. Terry* case, 111 Cal. 39, as authority for this proposition and approved the *Lewis v. Terry* decision. The court also apparently referred to the *Burr v. Sherwin Williams* case by mentioning the decision of the Supreme Court as to the privity of contract rule (as recently as April 1954), although that case it may be noted was decided in March 1954.

The *Pope & Talbot* decision has been completely ignored by appellants in their brief. It is the leading case in California on this subject and is directly in point. As was mentioned in that decision there are several older decisions to the same effect, such as the case of *Lewis v. Terry,* 111 Cal. 39, in which, at page 44, the court stated:

> "If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made." (Citing cases from other jurisdictions.)

C.

Had There Been Any Warranties in This Matter and Had They Not Been Terminated by the Repairs and Accidents and Use of the Conveyor Prior to the Accident in Which Decedent Was Killed, There Still Would Have Been No Breach of Warranty in the Above Action.

Appellants glibly refer to various express warranties which they claim were made. These are mentioned on page 6 of Appellants' Opening Brief.

"Aeroil Portable Equipment for the Modern Roofer". It is portable. There is no question about the fact that the conveyor is portable. Certainly there has been no breach of any statement therein contained.

"Look at these Mulkey Features, Balanced and Portable. One man can handle and operate." Respondents respectfully urge that the very meaning of the word "balanced" means that if it is over-balanced the machine will tip over. The word "balanced" connotes the fact that the conveyor can be placed into a position of balance. There was therefore no breach of warranty in that regard. The last statement is "One man can handle and operate." Respondents respectfully urge that there has been no proof whatever to the effect that this was not true. Had the riser not been installed, had the balance not been changed by removing the motor, and had the machine not been damaged by negligent use of it prior to the accident in which Herbert Weldon Young was killed, it could readily have been used and operated by one person alone. In fact had Mr. Young chosen to follow the technique referred to by witness Baker, the accident could not have occurred and Young would have been perfectly able to have handled the machine himself. This accident was not due to the fact that the conveyor could

not be operated by one person. It was due to the conveyor being mishandled by Mr. Young at the time of the accident. This did not constitute any breach of warranty whatsoever.

Certainly the further alleged express warranties "Eliminates Back-Breaking Labor Fatigue" and "will accommodate one 8-foot extension, and operate to a height of twenty-two feet" were all true and the testimony of plaintiffs' expert showed that the conveyor could be used in perfect safety at a height of twenty-two feet and was stable at that height. Likewise the only remaining statement that "the under-carriage moves forward for proper balance" was true.

It must also be borne in mind that the court stated the Mulkey brochure was not binding on the defendant Aeroil. No testimony was later introduced which would cause the Mulkey brochure to be binding on Aeroil. Undoubtedly the court found as a question of fact that the Mulkey brochure was not binding on Aeroil. No exception to his ruling in that regard was made by appellants. Moreover all of the statements in this Mulkey brochure were supported by the evidence.

Appellees respectfully urge that there was no breach of any of the alleged warranties.

D.

No Notice of Breach of Warranty Was Given to Defendant Aeroil.

Appellants have not contended that they gave any notice of any alleged breach of warranty. They state that on the day of the accident Mr. Weigart called Mr. Yundt and told him about the accident. Yundt at that time was working for Roofmaster and was no longer in any way

connected with Aeroil. Weigart admitted that he called Yundt at Roofmaster and that he knew Yundt was no longer working for Aeroil. Yundt stated that he notified the manufacturer Mulkey that an accident had occurred. This would certainly not constitute any notice of any alleged breach of warranty to defendant Aeroil. Appellants have alleged that there is no need for notice with reference to a breach of warranty, because of the fact that a warranty action for death is actually a tort action, rather than a contract action. Appellants cite *Prosser Law of Torts, 2nd Edition,* page 493, to establish the proposition that "this type of action is a curious hybrid of tort and contract unique in the law." It is significant that the entire chapter on this subject by Prosser there is no reference whatever to any abrogation of the general law that it is necessary to plead and prove notice of a breach of warranty. Certainly had there been such an exception it would have been mentioned by Prosser. Prosser restricts his statements as to "hybrid action" to three classes of cases. First, that the rule as to survival of a cause of action in a tort case rather than a contract case prevails, citing the case of *Gosling v. Nichols,* 59 Cal. App. 2d 442. The reasoning in this decision is in the interpretation of Section 377 of the Code of Civil Procedure, which specifically states that a tort action abates with the death of the wrong-doer and does not specifically define what is meant by the words "wrong-doer".

Second, that the tort rule as to limitation of actions rather than the contract period applies, citing the case of *Rubino v. Utah Canning Co.,* 123 Cal. App. 2d 18, which holds that the statute of limitations with reference to torts applies in food poisoning cases and again this

is predicated upon the definition in the statutes of the words "wrongful act or neglect."

The third type of cases referred to are those dealing with the measure of damages and again the words "wrong-doer" are used in the statute.

On page 20 of Appellants' Opening Brief they have stated "There is no requirement in law under the rules of tort actions to require the wife or minor children of the deceased to give notice." (Citing *Rubino v. Utah Canning Co.,* 123 Cal. App. 2d 18.) Respondents respectfully suggest that appellants have either deliberately or negligently cited said case as upholding this proposition since a careful examination of the decision does not reveal one single word with reference to the necessity or propriety of notice and the fact of notice is not referred to in any way.

Appellants have neglected to mention cases in California rising out of breach of warranty specifically and unequivocally holding that notice of breach of warranty must be given. The leading case in this regard is the case of *Vogel v. Thrifty Drug Co.,* 43 Cal. 2d 184. This case holds that notice of a breach must be pleaded and provide. At pages 187 and 188 the court states, paragraph 2,

> "But in making this argument plaintiff overlooks an element essential to stating a cause of action for breach of the implied warranty, i.e., an allegation that plaintiff gave notice of the breach to the defendant within a reasonable time.
>
> "Section 1769 of the Civil Code provides that 'In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages

or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor.'

* * * * * * * *

"(4) It further appears that 'The clear and practically unbroken current of authority establishes the doctrine that the requirement of notice to be given by the vendee charging breach of warranty is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach.' (Citing cases) 'The giving of such notice must be pleaded and proved by the purchaser seeking to recover or defend for the breach of warranty'; 77 C.J.S. 1276, 'Where the buyer must give notice of the breach of warranty, his plea or answer setting up a breach of warranty must allege the giving of the necessary notice within the proper time, or a waiver thereof by the seller. The giving of notice must be pleaded clearly and without ambiguity . . .'; 46 Am. Jur. 439, 'The burden is upon the one claiming the breach of warranty to plead and prove notice within a reasonable time'; see also Bailey Trading Co. v. Levey (1925), 72 Cal. App. 339, 345 (237 P. 408)."

The *Vogel* case arises out of warranty in a food poisoning case and is directly in point with the case at bar. Even without any of the other points involved in this appeal it would be an ample support for the court's decision as in the case involved here there was no pleading or proof of any notice of breach of warranty.

E.

There Is No Duty on the Part of a Retailer to Inspect or Make Tests on Goods He Sells.

Appellants have casually argued that there was a duty upon the part of Aeroil to inspect and make tests on the conveyor and that they are liable because of their failure so to do. This is not the law in California. The case of *Sears Roebuck v. Marhenko,* 121 F. 2d 598 is a case wherein a hot water bottle which was not manufactured by Sears was sold by them and where a test by Sears would have revealed a defect. A judgment in the lower court was given for plaintiff, but the United States Court of Appeals reversed the judgment on the ground that there is no obligation on the part of a retailer to test or inspect any goods which it sells. This case is directly in point and is a decision of the 9th District of the Federal Court. It is based on the California decision of *Tourte v. Horton Manufacturing Co.,* 108 Cal. App. 22. This is a case in which a washing machine was alleged to be defective and suit was filed against the dealer and a nonsuit was granted and upheld. At page 23 of this decision the court stated:

> "The dealer who purchases and sells an article in common and general use in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not. In 45 Corpus Juris, 893, we find the same rule stated: A dealer is under no duty or obligation to examine the articles which he sells to ascertain whether there are defects therein, and . . . is not liable for an injury arising from such defects where he had no actual knowledge thereof."

There are many other cases holding that there is no liability against a retailer unless there is a latent defect which is known to the retailer and not known to the purchaser. Among these are *Lewis v. Terry,* 111 Cal. 39 (*supra*), *Gutelius v. General Electric,* 37 Cal. App. 2d 455, *Youtz v. Thompson Tire,* 46 Cal. App. 2d 672, in which decision at page 675 appears this statement:

> "(2a) The controlling factor is therefore the extent of liability of a manufacturer or repairman for defects in workmanship when the defect is known to the purchaser or third person and not known to the manufacturer."

Appellees respectfully urge that the appellants have completely failed in their Argument I to establish any express or implied warranties flowing from the defendant Aeroil or Yundt to the decedent Herbert Weldon Young. There were no warranties at all alleged which were not true. There was no privity of contract. There was no notice of any breach and there were no latent defects known to the seller. Various cases cited by appellants might tend to establish certain warranties against manufacturers based on advertising, but the manufacturer is not involved in this action. However, here the buyer, Mr. Weigart, specifically relied on his own knowledge and experience. All of the decisions cited by the appellant in this regard apply strictly and only to the manufacturer and not to the dealer. The reasoning on which those cases are based likewise apply only to the manufacturer and not to the dealer.

IV.

The Court Did Not Err in Not Awarding Damages to the Plaintiffs in the Sum Prayed for in the Complaint.

Plaintiffs' second point does not require answer here. Obviously if the plaintiffs are not entitled to recover there is no right to any specific amount of damages and no finding in that regard was necessary or would have been proper. While the appellees do not agree at all with appellants as to the valuation of the case there is no need to argue this proposition here and no further argument will be made.

V.

The Findings of the Trial Court Are Supported by the Evidence.

It is difficult to reply to Point III of Appellants' Opening Brief in a logical or orderly fashion since this argument in appellants' brief consists of isolated statements apparently drawn at random from the transcript in order to argue that there was some evidence which might have supported findings contrary to those of the trial court. Appellants have made no effort to state all of the evidence on the points in question. Appellees have, therefore, followed the same order and referred this court to some of the contrary law and evidence on these points.

Weigart did not rely on the express warranties in the brochures. He wished to buy a Mulkey Conveyor because he knew them, knew how they were made and how they worked and how they compared with other types of conveyors he had used and with which he was familiar. [Rep. Tr. p. 142, line 23, to p. 143, line 24.] Representations in advertisements are not a part of the con-

tract of sale unless the buyer relies on those statements. (*Burr v. Sherwin Williams,* 42 Cal. 2d 682 at 696.) The Brochures do not constitute warranties to Herbert Young. There was no privity of contract between Young and respondents. (*Collum v. Pope & Talbot,* 135 Cal. App. 2d 653.) Moreover, there was no reliance on the part of the deceased. None of the brochures, except Exhibit 6, were admitted as against the defendant Aeroil. There were no express warranties made by Aeroil. Weigart had no conversations with Yundt as to the qualities of the Mulkey conveyor. He bought a Mulkey Conveyor in reliance on his own knowledge and experience. [Rep. Tr. p. 142, line 23, to p. 143, line 24.] The conveyor at the time of its delivery was of merchantable quality. The only defect claimed in design or construction was that if it were negligently tipped over then it would collapse. The conveyor had been mishandled and abused by Weigart and his employees from the date it had been purchased. Extensive changes and alterations which altered its balance and center of gravity had been made.

Aeroil Products Company was not the manufacturer and had no duty to test the conveyor for defects in its design or construction. (*Sears Roebuck v. Marhenko,* 121 F. 2d 598.) Aeroil made no representations except to copy, word for word, some of the statements made by Mulkey in their brochure. As has been stated above, Weigart did not rely on these statements. The statement that the representations in the brochures were not true has been treated above in Argument III, Subdivision C.

There was ample evidence to support the finding of the court "that the presence of said undercarriage or riser and lowering of the hitch created a hazard of over-

balancing said conveyor when lifting the hitch end of said conveyor high enough to cause said conveyor to be moved." This has been previously argued and referred to in the latter part of Argument III, Subdivision A of this brief.

While it is true that the changing of the normally lower end to the upper end did not directly injure Mr. Young, it is also equally true that even under the theory of the appellants unless Young had negligently permitted the conveyor to turn over and to hit the pavement violently it would have been impossible for the undercarriage to collapse. Therefore the alteration of the conveyor and the negligence of Mr. Young were directly responsible for the accident which caused his death.

Finally, there is ample evidence to support the finding of the trial court that Herbert Weldon Young was negligent. He did not follow the instructions of Weigart that the conveyor was not to be moved except when it was lowered. [Rep. Tr. p. 136, line 22, to p. 141, line 4.] He moved the conveyor when there was rock and debris in the road. [Rep. Tr. p. 65, line 19, to p. 70, line 25.] He did not follow the procedure outlined by Baker of moving the conveyor out a foot or so and then lowering it in stages, which Baker said was the method used by the employees for reasons of safety. This method would have made the accident impossible. [Rep. Tr. p. 102, line 1, to p. 105, line 9.] While Young was thoroughly familiar with the conveyor and had used it more than anyone else he negligently instructed Baker to remove the motor while the boom was up, thus changing the balance of the conveyor by 100 pounds. [Rep. Tr. p. 105, line 10, to p. 106, line 21.] He also negligently turned the conveyor by a 45 degree angle and lifted the

hitch waist-high at the same time, knowing the position of balance and that the engine had been removed. Also he then held on when the hitch end of the machine went up into the air, whereas if he had let go the accident would not have occurred. [Rep. Tr. p. 35, line 7, to p. 38, line 24.]

Conclusion.

Appellees respectfully urge that the judgment of the trial court should be affirmed. Appellants have not complied with the rules of this court. Therefore the appeal should be dismissed. However, on the merits the findings of the court were supported by the evidence in all respects. Apparently appellants are acting under the erroneous delusion that in order to entitle them to a reversal of the judgment all they must show is that there was some evidence which would have supported a finding in their favor. On the contrary here the situation is reversed. The judgment of the court must stand if there is any evidence to support the court's findings on any issue that would justify a judgment in favor of the defendants. Appellees contend that there was ample testimony to support the findings of the court. First, that there was no warranty on the sale in question because of the fact that Weigart did not rely on any representations and because of the further fact that the conveyor was mistreated, altered and damaged in such a way as to terminate any warranty if there had been one. Second, that the plaintiffs failed to prove that there was any privity of contract between the deceased and these defendants and, third, further failed to prove that there was any breach of any of the statements appearing in the brochures. Fourth, that plaintiffs failed to plead or prove that there

was any notice of breach of warranty to the defendant Aeroil within a reasonable time after the occurrence of the accident; fifth, that there was any duty on the part of Aeroil to inspect the conveyor. Lastly, appellees contend that a proximate cause of the accident which resulted in the death of Herbert Young was his own negligence in the operation of the conveyor at the time of the accident.

Appellees respectfully urge that the judgment of the court below be affirmed.

EUGENE S. IVES,

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